

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NORTHPOINTE COMMERCE PARK LLC,

Plaintiff,

v.

THE CINCINNATI INSURANCE COMPANY,

Defendant.

DECISION AND ORDER
14-CV-587-A

The plaintiff, Northpointe Commerce Park LLC, filed this insurance-coverage action against the defendant, The Cincinnati Insurance Company, to seek approximately \$1.4 million for alleged damage to commercial property at 60 Northpointe Parkway, Amherst, New York, allegedly caused by two windstorms. The action was removed from state court pursuant to 28 U.S.C. §1446, and is pending on diversity jurisdiction under 28 U.S.C. § 1332.

The action was referred to Magistrate Judge Hugh B. Scott for the conduct of pretrial proceedings pursuant to 28 U.S.C. § 636(b)(1). On December 24, 2014 Magistrate Judge Scott recommended that a motion for summary judgment under Fed. R. Civ. P. 56 of defendant Cincinnati Insurance on the ground that the action is time barred be granted in part and denied in part. (Dkt. No. 17). Specifically, the Magistrate Judge recommended that claims of plaintiff Northpointe based upon physical loss allegedly occurring due to a May 1, 2011

windstorm be dismissed as time barred, but that claims based upon a March 3, 2012 windstorm not be dismissed.

Defendant Cincinnati Insurance objects to Magistrate Judge Scott's Report and Recommendation on the ground that it does not address adequately whether "damages and repairs" in a contractor's \$1.4 million proposal after the first windstorm, but before the second, to replace certain panels covering the premises at 60 Northpointe Parkway are also "dismissed." (Dkt. No. 18). Plaintiff Northpointe opposes defendant's objection and maintains the Report and Recommendation should be adopted. (Dkt. No. 20).

The Court has carefully reviewed the Report and Recommendation, the pleadings submitted by the parties, and, finding oral argument unnecessary, it is hereby

ORDERED, upon *de novo* review of defendant Cincinnati Insurance's objection pursuant to 28 U.S.C. § 636(b)(1) to the Report and Recommendation, upon clear error review of the remainder of the Report and Recommendation, and for the reasons stated in the Report and Recommendation, partial summary judgment is granted pursuant to Fed. R. Civ. P. 56 on the ground that alleged damages for physical loss allegedly suffered by plaintiff Northpointe due to an alleged May 1, 2011 windstorm are time barred. Summary judgment is otherwise denied. The issues of causation and mitigation seemingly raised by defendant's objection to the Report and Recommendation were not raised below and,

therefore, are not yet properly before the Court. It is further

ORDERED, in light of the Court's grant of partial summary judgment, the Court finds the remaining allegations of plaintiff's complaint originally seeking \$1.4 million of damages may need to be amended as to the alleged damages, or to allege different legal theories. Accordingly, plaintiff Northpointe is granted until April 9, 2015 to file an amended complaint, if necessary. Defendant Cincinnati Insurance shall have until April 24, 2015 to answer, or, if plaintiff files an amended complaint, to move against the amended complaint or answer it.

The action is recommitted to Magistrate Judge Scott pursuant to the terms of the Court's prior referral order for further proceedings.

SO ORDERED.

Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: March 25, 2015